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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NICHOLAS COLAFELLA, K. LEROY IRVIS,
JAMES J. MANDERINO, MATTHEW J. RYAN,
and the BIPARTISAN COMMITTEE FOR THE
ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES AND THE COUNCIL OF STATE GOVERNMENTS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether members of an investigative committee of a state legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their investigative documents and reports served during an ongoing legislative investigation.

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INTEREST OF THE *AMICI CURIAE*

Amici curiae, the National Conference of State Legislatures, an organization representing the legislatures of the 50 States and American territories and commonwealths, and the Council of State Governments, a na-

tional organization representing all branches of state government including state legislatures, seek to further the vitality and autonomy of state legislatures within the system of federalism created under our Constitution. This case is of critical importance to States and their legislatures because the Third Circuit's decision threatens the integrity of the legislative process that is at the core of the Article IV, section 4, guarantee of a republican form of government in the States.

In this case, a United States Attorney caused a federal grand jury subpoena to be issued and served upon an investigative committee of the Pennsylvania legislature while it was engaged in an official legislative inquiry. Allowing a federal executive official to intrude into a State's legislative process in a case such as this, where no state legislator is alleged to be the subject of the federal inquest, and without establishing a compelling need or exploring less intrusive alternative means of obtaining evidence, endangers state sovereignty in a manner never sanctioned by this Court. Such intrusion upsets the delicate balance between state and federal powers, "a balance designed to protect our fundamental liberties." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting).

The gathering of information by a state legislature is a core legislative function that goes to the heart of state sovereignty; it has been exercised from time immemorial by English and colonial legislatures and it is recognized by this Court as an incident of fundamental legislative power. Potts, *Power of Legislative Bodies To Punish For Contempt*, 74 U.Pa.L.Rev. 691, 708-725 (1926) (collecting colonial and state precedents for contempt in the course of legislative inquiries); Landis, *Constitutional Limits on the Congressional Power of Investigation*, 40 Harv.L.Rev. 153, 156 (1927); *McGrain v. Daugherty*, 273 U.S. 135, 166 (1927) (citing state court cases sustaining power of legislature to compel testimony).

The state legislatures, represented by the National Conference of State Legislatures and the Council of State Governments, will be adversely affected by any rule that permits federal prosecutors, through the grand jury, to forage among institutional records generated by state legislative inquiries.

Because of their vital interest in preventing the erosion of the federal and republican structure of our government, *amici* respectfully urge the Court to grant the petition for certiorari.[1]

STATEMENT OF THE CASE

Amici essentially adopt the petitioners' statement of the case. From the perspective of *amici* as organizations representing state legislatures, several facts merit special emphasis in the Court's consideration of the petition.

The subpoena at issue in this case was served upon a *pre-existing* and *ongoing* state legislative committee engaged in a duly authorized and bona fide investigation into subject matter within its jurisdiction: compliance with the state Steel Products Procurement Act (requiring purchase of domestic steel for construction projects) in connection with the expansion of the State Capitol building in Harrisburg, Pennsylvania, the very edifice housing the state legislative chambers and offices; and review of the administration of that Act by the state Department of General Services.

The legislative investigation was authorized by resolution of the Pennsylvania legislature. As part of the investigation, the Committee received testimony from Walter Baran, the Secretary of the Department of General Services, over which the Committee had oversight responsibility. It was this witness, himself a subject of the Com-

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[1] Under Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

mittee's inquiry, at whose request the United States Attorney for the Middle District of Pennsylvania began his investigation and convened the grand jury that issued the contested subpoena. Nothing in the record suggests that the United States Attorney had any independent interest in the subject matter being investigated by the Committee, or in its sources or work product, until the request was lodged. But for Baran's own initiative in seeking his assistance, the United States Attorney might never have become involved.

The materials sought are documents integral to the conduct of the legislative committee investigation, not merely incidental byproducts of the Committee's inquiry. They include investigative reports, memoranda and summaries from interviews of witnesses by committee employees, handwritten and typewritten notes of such memoranda and interviews, including purely internal committee communications not directly characterizing the statements of persons interviewed. *Amici* believe that the peculiarly sensitive and deliberative nature of the materials sought is highly significant to the legal issues presented for review.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Denial Of Protection To Ongoing Legislative Activity Is Inconsistent With The Precedents Of This Court And Other Courts.

The Third Circuit's ruling that, under the Supremacy Clause, a subpoena issued upon the initiative of the federal executive branch takes precedence over a state legislature's interest in protecting its legislative processes from intrusion, 821 F.2d 946, 954, is inconsistent with prior decisions of this Court and other courts. In denying protection to the state legislative committee, the court of appeals relied primarily on *United States v. Gillock*, 445 U.S. 360 (1980), which does not, however, support the court's decision. *Gillock* held only that an individual

state legislator's legislative acts could be used in evidence at his trial on federal criminal charges because the separation-of-powers concerns among co-equal federal branches undergirding the federal speech or debate privilege were not present in a federal prosecution of a state official. In *Gillock*, upholding a speech or debate privilege for a state legislator by barring use of specific evidence at trial would have served to immunize conduct proscribed by law by Congress. Here, of course, upholding the legislature's institutional claim would have no such effect; state legislators are not targets of the grand jury investigation.

In *Gillock*, the interference in the state legislative process was incidental because only an individual legislator unlawfully exploiting his position was targeted for prosecution; here, the interference is directly with the processes of the legislature as an institution. Another court of appeals has recognized that:

> . . . even though material comes to a legislative committee by means that are unlawful or otherwise subject to judicial inquiry the subsequent use of the documents by the committee staff in the course of official business is privileged legislative activity.

McSurely v. McClellan, 553 F.2d 1277, 1296 (D.C. Cir. 1976) (en banc), *cert. dismissed sub nom. McAdams v. McSurely*, 438 U.S. 189 (1978). In sum, it is the information-gathering process of the legislature itself that is jeopardized—totally unlike *Gillock*, which involved the public legislative acts of an individual legislator, not the documentary and testimonial products of an investigation by the legislative body.

In denying the legislature's claim, the Third Circuit has set itself in clear and irreconcilable conflict with at least one other court of appeals. In *In Re Hampers*, 651 F.2d 19 (1st Cir. 1981), the court quashed a federal grand jury subpoena to the Massachusetts Commissioner of Revenue in a federal investigation, holding that the federal interest in seeking information did not outweigh the

state interest under principles of comity and federalism. *Id.*, at 23. A federal grand jury was investigating an arson-insurance fraud scheme and sought evidence from the state Commissioner of Revenue concerning the non-payment of sales tax on meals and beverages of a restaurant that suspiciously burned down. The information sought—collected by the Commission in furtherance of its authority under state law—was deemed protected. The court held that the federal grand jury must proffer reasonable cause to believe that a federal crime has been committed, that the information sought is probative of a matter at issue, and that the information cannot be obtained elsewhere through reasonable efforts. *Id.* A state legislature, no less than a state administrative agency, is due the deference and comity accorded the State by the First Circuit in *Hampers*.

The Third Circuit's opinion also ignores the substantial jurisprudence developed by this Court and other courts protecting the processes of legislative investigative committees. These precedents emphasize the fundamental premise that the exercise of legislative factfinding is a core function of both state and federal sovereignty. *Hannah v. Larche*, 363 U.S. 420, 440-44 (1960) (Civil Rights Commission's purely legislative investigative function did not vest certain due process rights in persons under investigation); *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (state legislative committee's actions in reading into record statements of alleged criminal record of plaintiff constituted acts "in a field where legislators traditionally have power to act"); *Green v. DeCamp*, 612 F.2d 368, 371 (8th Cir. 1980) (state legislative committee's report criticizing homicide investigation undertaken by city police chief is part of legitimate legislative investigation).

The jurisprudence developed by this Court respecting the sanctity of the federal legislative process from executive branch interference under the federal Speech or

Debate Clause, U.S. Const., art. I, § 6, cl. 1, is itself based largely on colonial and state precedents. The Court has drawn frequently from cases involving colonial and state legislative experience to buttress its interpretation of the federal Speech or Debate Clause as a bulwark against executive branch interference. *E.g., United States v. Helstoski*, 442 U.S. 477, 493 (1979) (citing with approval and relying upon *Coffin v. Coffin*, 4 Mass. 1 (1808) in interpreting federal speech or debate privilege); *Powell v. McCormack*, 395 U.S. 486, 501 (1969) (citing *Tenney v. Brandhove*, in construing scope of Speech or Debate Clause in suit by federal legislator charging unconstitutional exclusion from House of Representatives). *See also McGrain v. Daugherty*, 273 U.S. at 174 ("We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified."). The court of appeals' treatment in this case of the State's sovereign interest in free and unfettered legislative inquiry is inconsistent with and contrary to these precedents.

As the Court recognized in *Tenney*, there is no reason to believe that Congress, in enacting the civil rights statute, 42 U.S.C. § 1983, intended to divest state legislatures of protection for their processes; nor is there any reason to believe that Congress so intended in enacting any of the criminal statutes providing authority for the grand jury investigation in this case.

Furthermore, as *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509-10 n.16 (1975), emphasizes, interference with an *ongoing* legislative committee investigation is especially to be guarded against in the interest of preserving legislative branch independence.

The United States House of Representatives and the Senate have successfully resisted similar subpoenas for

their institutional records from civil litigants and grand juries on the grounds that such demands intrude on legislative processes and inhibit free and vigorous legislative inquiry. *E.g.*, *In Re Guthrie*, 733 F.2d 634 (4th Cir. 1984) (subpoena to Clerk of House for records of Select Committee on Aging investigation); *United States v. Ehrlichman*, 389 F. Supp. 95, 97 (D.D.C. 1974), *aff'd on other grounds sub nom. United States v. Liddy*, 542 F.2d 76 (D.C. Cir. 1976) (executive session transcript).

The courts have sustained the right of the legislature to maintain the inviolability of its legislative records not solely by relying on the Speech or Debate Clause, but because of the manifest need for legislative independence. In *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936), the court determined that it could not restrain use of documents by a Senate committee, even though unconstitutionally seized, because "the universal rule . . . is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference." While the court based its reasoning on separation of powers grounds, it did so without reference to any textually based privilege like speech or debate, and inferentially relied on state legislative experience. *See id.*, at 72, quoting from *Alpers v. San Francisco*, 32 F. 503, 506 (C.C. 1887) (attempt to enjoin the exercise of legislative power is not within jurisdiction of court of equity: "This no one will question as applied to the power of the legislature of the state").

State legislative independence is fundamental to the full exercise of state sovereignty, and nothing in *Gillock* is to the contrary. This Court has held that the decision to locate a state capitol involves "peculiarly state powers," *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911), and that a statute passed by Congress establishing conditions under which a new State was to be admitted to the union did not "deprive a new State of any of those attributes essential to its equality in dignity and power

with other States." *Id.*, at 568. The power of the legislature to conduct its business is plainly even more "essential to its equality in dignity and power" than its power to decide the location of its capitol. "Just as surely as the Framers envisioned a national government capable of solving national problems, they also envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 581 (1985) (O'Connor, Powell, Rehnquist, JJ., dissenting).

The court of appeals in this case gave no weight or consideration to these precedents, and this Court should grant certiorari to resolve the conflict with the decisions of the other circuits and this Court.

II. This Court Should Invoke Its Supervisory Power Over Lower Federal Courts To Resolve The Issue In This Case Because It Presents The Potential For Recurring Confrontation Between Grand Juries And State Legislatures.

Whether the lower federal courts should use their processes to enforce grand jury subpoenas directed to state legislatures for institutional records evidencing their internal and deliberative processes is a question of great importance over which this Court should invoke its supervisory and administrative jurisdiction.

This Court has many times exercised its certiorari discretion to supervise the lower federal courts and to insure the proper functioning of the federal judiciary. It has done so to consider important procedural issues, like the construction of the federal rules of civil or criminal procedure, *Hickman v. Taylor*, 329 U.S. 495 (1947), *Schlagenhauf v. Holder*, 379 U.S. 104, 109 (1964), the power of removal to federal courts, *Thermatron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), or the scope of

the federal contempt power, *Sacher v. United States*, 343 U.S. 1 (1952).

The appropriateness of using the federal grand jury to subpoena institutional legislative documents from a state legislature under Federal Rule of Criminal Procedure 17 is an issue that falls within the Court's supervisory and administrative jurisdiction, particularly since it implicates sensitive relationships between federal officers, United States Attorneys, and state legislatures in all 50 States. *See Rizzo v. Goode*, 423 U.S. 362, 379 (1976) (principles of federalism must be given weight in determining "availability and scope of equitable relief" that can be imposed by federal courts in a system "subsisting side by side with 50 state judicial, legislative and executive branches").

The grand jury has been described as an independent entity, that is, not wholly a part of either the judicial or executive branch. Though the United States Attorney, an executive branch official, may cause subpoenas to be issued without resort to or consultation with the court, enforcement lies only with the processes of the court. And this Court has not hesitated to control the use of the subpoena and enforcement processes of the lower courts. For example, see *United States v. LaSalle National Bank*, 437 U.S. 298, 311-316 (1978) (Court announced standards for district court enforcement of IRS summons where recipient alleged that agency was using its civil investigative authority to gather evidence for a criminal prosecution); *McNabb v. United States*, 318 U.S. 332, 340 (1943) (on basis of supervisory power over the administration of justice, Court excluded illegally obtained confession from use at criminal trial).

The court of appeals held that the law protects state legislators only against civil suit, and not against a grand jury subpoena. In doing so, it misconceived the nature of a third party subpoena to the legislature

acting as a legislature and failed to distinguish that case from one involving an individual legislator targeted for prosecution. The former resembles more a civil suit, for which protection traditionally applies under *Tenney*, than it does a criminal proceeding.

The proceedings on the legislature's motion to quash are both collateral to the issue of criminality with which the grand jury is concerned, and distinct from any proceedings or actions which might arise from the grand jury's actions by way of indictment or report. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949). This case, like *Tenney*, therefore, involves a civil proceeding of the kind for which state legislatures have been accorded protection, rather than a criminal proceeding. *Cf. United States v. Nixon*, 418 U.S. 683, 713 (1974) (trial subpoena by special prosecutor for evidence relevant to pending criminal case overcame presumptive presidential privilege).

If the rule announced by the Third Circuit in this case takes hold, the result will be further confrontation between United States Attorneys and state legislatures.

It is important for this Court to clarify the power of the grand jury in this regard to assure viability of coordinate state legislative processes and to preserve the power of the States to act in areas essential to the perpetuation of their sovereignty.

CONCLUSION

The Court should grant certiorari to review and resolve the conflict between the Third Circuit and this and other courts on this important issue.

Respectfully submitted,

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